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No. 779

In the

Supreme Court of the United States

October Term, 1962

RICHARD BOSTIC,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

Richard Bostic petitioner herein, prays that a writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Ohio entered in the case of *State of Ohio vs. Richard Bostic* on the 31st day of October, 1962.

OPINIONS BELOW

The journal entry of judgment of the Court of Common Pleas is unreported and appears in the transcript of the record. The opinion of the Court of Appeals of Franklin County, Ohio is unreported and appears herein as Appendix A. The dismissal of the appeal by the Supreme Court of Ohio is reported in Ohio Bar, page 24, December 3, 1962 and is printed herein as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on October 31, 1962. The jurisdiction of this Court is invoked under 28 USCA Section 1257 (3).

QUESTIONS PRESENTED

I. Where the Supreme Court and the inferior courts of Ohio refused to allow the defendant to compel prosecution witnesses to disclose an informer's identity, which disclosure was relevant and helpful to the defense and essential to a fair determination of the cause, was the decision contrary to the fundamental requirements of fairness embodied in the 14th Amendment and applicable decisions of this Court?

II. Was the Supreme Court of Ohio correct in affirming the judgment of the Court of Appeals which sustained the trial court's denial to the petitioner of his constitutional right of full, fair and complete cross examination of the prosecution witnesses embodied in the 6th and 14th Amendments to the Constitution of the United States and Article 1, Section 10 of the Ohio Constitution?

STATUTES INVOLVED

1. Vol. 1 USC Amendment 6, Constitution of United States, page XLVI.

2. Vol. 1 USC, Section 1, Clause 3, Amendment 14 Constitution of United States, page XLVII.

3. Page's Ohio Revised Code Volume Appendix, Article 1, Section 10, Constitution of Ohio, page 373.

STATEMENT OF THE CASE

The Grand Jury of Franklin County, Ohio, returned a joint indictment charging the Petitioner, Richard Bostic, and one Robert Wilkins with burglary and attempt to force entry into a depository box.

Robert Wilkins entered a plea of guilty and at the time of Richard Bostic's trial, Wilkins was confined to the Ohio Penitentiary.

Upon the trial of Richard Bostic, the evidence showed that on or about the 5th day of October, 1960, Mr. Arthur Wiggins, owner of the Hammond Food Company, 777 West River Street, Columbus, Ohio, was requested at about 4:30 P.M. or 5:00 P.M. to give the keys to the property at 777 West River Street to certain Columbus Police Officers. At that time, Mr. Wiggins was informed that the police had reason to believe that the premises would be burglarized and for him to remove all of the money from the safe.

At approximately 8:00 P.M. on October 5, 1960, twenty or so police officers assigned to the case met at police headquarters and received their assignments about the premises of the Hammond Food Company. Upon the command "move in" over the police radio these same twenty officers proceeded to the Hammond Food Company and took up their respective preassigned positions.

Robert Wilkins was apprehended by the police in the combination office and warehouse building of the Hammond Food Company. The defendant Richard Bostic was found lying unconscious in some tall grass a short distance from the south side of the building.

The evidence in the case at bar nowhere discloses the number of persons arrested at the scene of the burglary, however, it does disclose that only two were ever indicted.

The uncontradicted testimony of Robert Wilkins was that he, together with Jack Wilson and a man named

George, went to the vicinity of the Hammond Food Company in Jack Wilson's automobile. Upon learning of the intent to burglarize the premises, the Petitioner attempted to leave, but was knocked unconscious by the person named George. The next thing the Petitioner herein was aware of was when he was in the custody of two police officers.

Wilkins testified that he pushed George through the window, so that he could open the door for Wilson and Wilkins to enter. He further testified that between four and eight minutes after they had entered the building the police arrived. Wilkins did not see the police officers arrest either George or Wilson, but he did testify that they were both in the building when the police arrived. There was evidence that one man ran away and escaped.

Counsel for the defendant, beginning with the first prosecution witness, repeatedly attempted to elicit from the police information, information concerning the facts upon which the police department acted when they went to Mr. Wiggins and requested the keys to the Hammond Food Company. The defendant maintained throughout the trial that the plan to commit the burglary had originated as a plot between Jack Wilson, one of the participants, in fact the participant whose automobile was used, and the Columbus Police Department. Further, that the whole scheme was designed solely to entrap the defendant. The trial court, fully aware of the defense relied upon by the accused, nevertheless refused at every juncture to permit him to show his freedom from guilt, by refusing to compel the Columbus Police Officers who testified to reveal the source of their information, and by refusing to compel the same officers to produce certain records made in the ordinary course of police business which would have revealed the material elements of entrapment.

The following excerpts from the Bill of Exceptions illustrate the stage in the Court of first instance, and in appellate court, at which the federal questions sought to be review were raised; method of raising them, and the way in which they were passed on by the Court.

The following portion of the cross examination of Detective Herman Stofle of the Burglary Squad of the Columbus Police Department is respectfully called to the Court's attention, as it appear on pages 38 and 39 of the Bill of Exceptions:

(Mr. Britt, defense counsel):

"Q. Jack Wilson was a tipster on this, wasn't he?

(Prosecutor)

"Mr. Newsom: I object, Your Honor.

"The Court: Oh, yes, I will sustain that.

"Mr. Britt: Your Honor, I think this leads into an entrapment which is certainly proper.

"The Court: I don't see any entrapment yet.

"Mr. Britt: Well, that what I am trying to develop, Your Honor.

"The Court: Well, I don't see any prospects of it.

"Mr. Britt: Well, I think it's certainly proper questioning, Your Honor, as to whether or not there was a prearranged plan with the Police Department.

"The Court: It wouldn't make any difference. The man is in there burglarizing, it wouldn't make any difference whether somebody tipped them off or not.

"Mr. Britt: Well, it goes further than that, though, Your Honor.

"The Court: Not yet.

"Mr. Britt: Note exceptions."

Here, then, is disclosed the attitude of the trial court and the tenor of the entire trial.

Then, during the cross examination of Captain Tom Sawyer, Chief of the Detective Bureau of the Columbus Police Department, the following occurred (B. E. 151):

"Q. (By Mr. Britt, Defense Counsel) You knew that this burglary was going to be committed that night, didn't you? "A. Not that particular night, no. We knew it was going to happen.

"Q. And from whom did you learn that it was going to happen. "A. Anonymous tip.

"Q. Jack Wilson? "A. I said an anonymous tip.

"Q. Who?

"Mr. Newsom: I object.

"Q. (By Mr. Britt) Was it Jack Wilson? Yes or no?

"Mr. Newsom: I object, I object.

"The Court: I sustain it. They got a tip it was going to happen.

"Q. (By Mr. Britt) I ask you this, Captain Sawyer, was it Jack Wilson?

"Mr. Newsom: I object.

"The Court: And I sustained the objection to that.

"Mr. Britt: Note exceptions."

Then at page 154 of the Bill of Exceptions, continuing the same cross examination:

"Q. (By Mr. Britt) The regular reports in the regular course of business were submitted to you after this thing, isn't that right? "A. Yes, more or less. In other words, I was given a rundown on the whole case.

"Q. Was the anonymous tipster also involved out there that night?

"Mr. Newsom: I object, Your Honor.

"The Court: I sustain it.

"Q. (By Mr. Britt) Isn't it a fact that this matter was prearranged with the knowledge of the Policy Department as to this burglary?

"Mr. Newsom: I object, Your Honor.

"The Court: Well, he may answer that.

"The Witness: Would you repeat your question? I'm sorry.

"Mr. Britt: Read it back, will you, Max?

(The Reporter read the pending question.)

The Witness: "As I answered a few moments ago, I said that we knew that the place was going to be burglarized. We didn't know when. However, on previous occasions the place had been burglarized on a Wednesday night and we felt that it would be again on a Wednesday night.

"Q. And you had a tip that it was going to be done?

"A. That's right sir.

"Q. And isn't it also a fact there you knew at least one person who was going to be there? "A. No.

"Q. You didn't know? "A. No.

"Q. Did any of the police know, to your knowledge?

"Mr. Newsom: I object.

"The Court: Well, now, of course, that's objectionable right off. How would he know what other policemen—"

At the conclusion of the testimony of Captain Tom Sawyer counsel for the defendant proffered the following at page 158, of the Bill of Exceptions:

> "Mr. Britt: I would like the record to show that if it had not been restricted upon cross-examination of Captain Tom Sawyer of the Columbus Police Department, who was head of the Detective Bureau, that we would have been able to establish through his testimony and the records made in the ordinary course of conduct of the Police Department that the burglary in question was committed as induced by an officer of the Columbus Police Department in conjunction with Jack Wilson who has been previously identified and will be further identified; and that had he been required to testify, all the elements of entrapment would have been developed in cross examination of Captain Sawyer."

Continuing in the same atmosphere, the cross-examination of Detective Sergeant Paul Fulton went as follows at page 165 of the Bill of Exceptions:

"Q. Was there any other report submitted to you concerning this? "A. We have had another one since that time.

"Q. Where is it? "A. Probably at Police Headquarters.

"Q. Can you get that? "A. We can get a copy of it.

"Q. And that is also submitted in the ordinary course of business, is it not? "A. Yes, sir.

"Q. Can you get that report for us? "A. Yes, there's copies of it.

"Q. All right. I'd like to get that.

"The Court: You don't need to. It's hearsay.

"Mr. Britt: I would not be, in the ordinary course of business, Your Honor.

"The Court: I ruled.

"Mr. Britt: Note exceptions."

The validity of all of these rulings of the trial court was raised in the appellate courts and upheld by them. The Court of Appeals of Franklin County, Ohio affirmed the judgment of the trial court finding no error apparent in the proceedings or the record. The Supreme Court of the State of Ohio dismissed the appeal for the reason that no debatable constitutional question exists thereon.

REASON FOR GRANTING THIS WRIT

The Supreme Court of the State of Ohio has decided a federal question of substance in a way not in accord with the applicable decisions of this Court.

ARGUMENT

I. Petitioner contends that the Constitutional guarantee of a fair trial implicit in the due process clause of the Fourteenth Amendment and the applicable decisions of this Court demanded the disclosure of the identity of the informer.

The due process clause of the Fourteenth Amendment requires the accused in criminal proceeding be given a fair trial. *In Re Murchison*, 349 U.S. 133, 75 Sup. Ct. 623, 99 LED 942; *Massey v. Moore* 348 U.S. 105, 75 Sup. Ct. 145, *Powell v. Alabama* 287 U.S. 45, 77 LED 158, 53 Sup. Ct. 55; *Marelia v. Burke*, 197 F 2d 856; *Ex Parte Lee* 123 F. Supp. 439; *McGarty v. O'Brien*, 96 F. Supp. 704.

A fair trial requires accused be given a fair opportunity to prepare and present his available defenses. *Williams v. People of State of New York*, 337 U.S. 241, 69 Sup. Ct. 1079, 93 LED 1337; *In Re Oliver*, 333 U.S. 257; *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708.

The common law privilege to withhold from an accused disclosure of the identity of persons who furnish information relating to violations of law is *not* absolute, but is subject to certain limitations and exceptions.

As to the question of when the privilege of nondisclosure applies and when an exception should be made, no fixed rule is justifiable. Limitations on the applicability of the privilege arise from the fundamental requirements of fairness. The privilege reflects a rule of policy which is followed unless in conflict with a rule of justice. The privilege must give way to disclosure where the informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair trial. *Roviaro v. U.S.* 353 U.S. 53, 60, 62, 1 LED 2d 639, 77 Sup. Ct. 623; *Scher v. U.S.* 305 U.S. 251 (1938), 59 Sup.

Co. 474, 83 LED 451; *Portomene v. United States*, 8 Cir., 221 F. 2d 582, 583-584; *U.S. v. Conforti*, 7 Cir. 200 F 2d 365, 367; *Sorcinigo v. U.S.*, 9 Cir. 163 F 2d 627, 628, 629; *People v. McShane* 50 Cal. 2d 802, 330 P2d 33, 36; *State v. Hardy*, 114 SO 2d 344; *Centoamore v. State*, 105 Neb. 452, 181 N.W. 182, 183; Wigmore Vol. 8 page 756 and 76 ALR 2d 262.

> The theory of the rule requiring disclosure of the identity of an informer is to give the defendant an opportunity to uncover facts relating to the informers participation, permit an investigation of the information given to an officer, to allow the defendant to locate and interview an informer and subpoena him, and to give him fair opportunity to substantiate his denial by obtaining information useful in preparation of his defense. *People v. Escalo*, 9 Cal. Rptr. 488.

Disclosure of the identity of an informer becomes even more compelling when the nature of his activities take on that of a participant. *Roviaro v. U.S.*, 353, U.S. 53; *Portomene v. U.S.* 221 F2d 582; *U.S. v. Conforti* 200 F2d 365, cert. den., 345 U.S. 929, 73 Sup. Ct. 782, 97 LED 1356; *Sorcinigo v. U.S.* 163 F2d 627.

In the case at bar, the alleged informer, Jack Wilson, was the defendant's one material witness. Counsel for the defendant attended to establish, if he had been allowed to elicit the name of the informer during cross examination of a police officer, that the burglary in question was committed as induced by an officer of the Columbus Police Department in conjunction with Jack Wilson who had been previously identified, and if they had been required to testify, all the elements of entrapment would have been developed in the cross examination of Captain Sawyer and Sgt. Fulton.

As was stated in *Gilmore v. U.S.*, 256 F2d 656, at pg. 257:

> "As anonymous was a principal actor before and during this performance, who he was and what he knew

was certainly material and relevant. In this testimony there might have been the seeds of innocence, of substantial doubt, or overwhelming corroboration. As the inferences from it covered the full spectrum from innocence to guilt, the process of truthfinding, which should be the aim of every trial, compelled its disclosure."

With the first witness to appear on behalf of the prosecution, the defense took its first opportunity, by way of cross examination to learn the identity of the informer. The defense maintained throughout the trial that the alleged informer had helped in setting up the criminal transaction and had played a prominent part in it. His testimony might have disclosed an entrapment, but the trial court continuously refused to allow counsel for the defendant to elicit the alleged informer's identity. His identity and subsequent testimony would have been relevant and helpful to the defense of entrapment and was essential to a fair trial.

For the reasons stated, Petitioner contends that the Supreme Court of Ohio, by condoning the action of the trial court, has deprived Petitioner of his liberty without due process of law.

II. Petitioner further contends that the denial of his rights, (confrontation and cross examination and right to prepare and defend) taken in connection with the particular circumstances of the case at bar, deprived him of his liberty without the due process of law required by the Fourteenth Amendment to the Constitution of the United States.

Although the due process clause of the Fourteenth Amendment doesn't incorporate the specific guarantees of the Sixth Amendment, denial by the states of rights or privileges embodied in that, and others of the first eight amendments, may in certain circumstances deprive litigants of the due process of law required by the Fourteenth

Amendment; *Bute v. Illinois*, 333 U.S. 640 (1948); *Betts v. Brady v. Warden*, 316 U.S. 455, 461 (1942); *Twining v. New Jersey*, 211 U.S. 78, 99 (1908).

The right of the accused to be confronted with those who testify against him is secured and guaranteed by Amendment 6 of the Constitution of the United States and Article I, Section 10 of Constitution of Ohio. *Greene v. McElroy*, 360 U.S. 474, 496-498 and *Summons v. State of Ohio*, 5, Ohio State 325.

Confrontation is, in its main aspect, merely another term for the test of cross examination. The main or principal purpose of the constitution guarantee is to assure the right of cross examination *Douglell v. U. S.*, 221 U. S. 325, 31 Sup. Ct. 590, 55 LED 753; *Weaver v. State of Ohio*, 120 Ohio St. 97; *State v. Rodriguez*, 110 Ohio App. 313.

As to the breadth of cross examination in criminal actions in Ohio, the Court of Appeals for Hamilton County in *State v. Browning*, 98 Ohio App. 8, 128 N.E. 2d 173, said:

> "Cross examination of a witness is perhaps the most effective means devised by law for discovery of the truth, and is an accepted universal right. The Constitutional right of an accused in any criminal case to meet witnesses face to face includes in its purpose the opportunity and right to cross examine all the state's witnesses and the widest latitude to law is granted in criminal case, where the life, liberty and property of the accused are exposed to adverse and hostile witnesses."

The right of cross examination extends to the res gestae upon the trial of a criminal matter. *Morgan v. State*, 48 Ohio St. 371. Res gestae was defined in *Wade v. State*, 2 O.C.C. N. S. 189, 25 O.C.C. 279, aff'd 70 O.S. 463, 72 N.E. 1166, as:

When due to the nature of the defense, the only means to its establishment is through confrontation and cross examination of adverse witnesses, these means should be afforded. The Ohio Courts have refused to afford them.

In speaking of the defense of entrapment Mr. Justice Roberts said at page 457 in case of *Sorrells v. U. S.*, 287, U. S. 435, 54 Sup. Ct. 210, 77 LED 413:

> "The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the Court no matter by whom or at what stage of the proceedings, the facts are brought to its attention. Proof of entrapment at any stage of the case, requires the Court to stop the prosecution, direct the indictment be quashed, and the defendant set at liberty."

The trial court not only refused to deal with the defense but refused to allow even an attempt by counsel for the defendant to deal with it.

Failure to afford a *reasonable* opportunity to defend against a charge is a denial of due process of law. *In Re Murchison*, 349 U.S. 133, 134; *Williams v. New York*, 337 U.S. 241, 245; *Paterno v. Lyons*, 334 U.S. 314, 320; *In Re Oliver*, 333 U.S. 257, 273; *Cole v. Arkansas*, 333 U.S. 196, 201.

Petitioner's right of fair cross examination, as constituted under Ohio criminal case law, and secured to him by the Constitutional provisions requiring confrontation, has been denied. This denial, taken in connection with the circumstances of the case, was a denial of the essential fairness and justice required by the due process clause in all criminal proceedings.

CONCLUSION

By reason of the foregoing, Petitioner respectfully prays this Court that his petition for writ of certiorari to the Supreme Court of Ohio be granted.

Respectfully submitted,

James C. Betti,
297 So. High Street, Columbus, Ohio,
Attorney for Petitioner.

APPENDIX A

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

STATE OF OHIO, Plaintiff-Appellee, v. RICHARD BOSTIC, Defendant-Appellant.

OPINION

(Rendered on December 26, 1961)

DUFFY, J.

The defendant, appellant herein, was found guilty of the crimes of burglary and attempt to force entrance into a depository box, and was sentenced by the trial judge to serve consecutive sentences in the Ohio Penitentiary. He has appealed his conviction to this court, and gives the following as his assignments of error:

1. The trial court denied the defendant his constitutional right to a full and complete cross-examination of the witnesses who testified against him.

2. The trial court refused to compel the production of evidence in the hands of witnesses who testified against the defendant, which evidence was material in proving defendant's defense.

3. Errors of law occurring at the trial as a result of which the defendant was deprived of his constitutional rights to a fair trial.

We have reviewed the evidence presented in the trial court, as well as the ruling of the trial judge, and we find nothing in the record prejudicial to the defendant, and conclude that the assignments of error are not well taken and the judgment of the trial court, entered on the conviction, will be affirmed.

Judgment affirmed.

Duffey, P. J., and Bryant, J., concur.

APPENDIX B

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, Appelle v. BOSTIC, Appellant

OPINION

(Rendered October 31, 1962)

PER CURIAM.

The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

Weygandt, C. J., and Zimmerman, Taft, Matthias, O'Neill and Griffith, JJ., concur.

Herbert, J., not participating.

APPENDIX C

The three constitutional provisions involved in this case are Amendment 6, Section 1, Clause 3; Amendment 14 of the Constitution of the United States and Article I, Section 10 of the Constitution of Ohio:

Amendment 6: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

Amendment 14: Section 1, Clause 3: Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 10, Constitution of the State of Ohio:

> (Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.)."

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusa-

tion against him; and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself, but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended Sept. 3, 1912).

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INTRODUCTION

The Petitioner in his brief, at page (2), sets forth what purports to be two questions as the basis for this Court's jurisdiction. An analysis of these two statements would indicate that basically only one question is in issue. The sole issue is whether or not the Ohio courts, in their ruling, denied the Petitioner a fair and impartial trial as guaranteed under the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

The Petitioner, Richard Bostic, was indicted jointly with one Robert Wilkins by the Franklin County Grand Jury for the crimes of burglary, and attempt to force entrance into a depository box.

Robert Wilkins entered a plea of guilty to the indictment on November 4, 1960, and was sentenced to the Ohio Penitentiary according to law, the terms to be served consecutively, and ordered to pay court costs.

On May 2, 1961, after a two-day trial, a jury returned a verdict of guilty against Petitioner as to both counts in the indictment. The Court then sentenced Petitioner to the Ohio Penitentiary according to law, the terms to be served consecutively, and ordered the payment of court costs.

During this trial the evidence established that on the night of October 5, 1960, the Petitioner and Robert Wilkins went to 777 River Street, which is in the City of Columbus, Franklin County, and State of Ohio, and forcibly broke and entered the Hammond Food Company located at said address. After gaining entrance to the building, they forced their way into the office where the safe was located. They used a sledge hammer, crow bar and punch in an attempt to force entrance into the safe. These tools were recovered by the police at the scene. When the Petitioner was being slated into the city prison, after his arrest outside this building, he attempted to eat a piece of paper which was positively identified as being the sales slip from a hardware store for tools of the total value of the ones found at the scene. This appears in the Bill of Exceptions, pages 55 and 56.

The Columbus Police Department had been informed prior to October 5, 1960, that this particular establishment would be burglarized again, and in view of the fact that this place had been burglarized before on Wednesday, it

was "staked out" on this particular Wednesday, October 5, 1960. Therefore, after the Petitioner and Wilkins had gained entrance to the building and were attempting to open the safe, the police moved in.

Robert Wilkins was apprehended inside the building. The Petitioner, Bostic, was apprehended outside the building, but had been seen by a police officer prior to his apprehension inside the building when he stuck his head out of the window. This is verified in the Bill of Exceptions at page 32.

In addtion to the cash register receipt which was taken from the Petitioner at the time he was slated in at the city jail, his clothing was also taken from him and turned in to the crime laboratory. The chemist, by means of a vacuum cleaner, removed dust particles and debris from the Petitioner's trousers and made a comparison of said debris with known paint chips from the scene of the burglary, and testified that the paint chips found in the cuffs of the trousers worn by Petitioner on the night of the burglary were identical to paint chips removed from a door at the scene of the burglary. See Bill of Exceptions, pages 174 and 175.

ARGUMENT

The Petitioner contends that the constitutional guarantee of a fair trial implicit in the due process clause of the Fourteenth Amendment, and the applicable decisions of this Court demand the disclosure of the identity of the informer. This would appear to be the sole issue raised in this petition for writ of certiorari. The Petitioner, in the first instance, is relying on *In Re Murchison*, 349 U.S. 133, also 75 Supreme Court 623, 99 LED 942; *Massey v. Moore*, 348 U.S. 105, 75 Sup. Ct. 145, *Powell v. Alabama*, 287 U.S. 45, 77 LED 158, 53 Sup. Ct. 55; *Marcia v. Burke*, 197 F 2d 856; *Ex Parte Lee*, 123 F. Supp. 439; *McGarty v. O'Brien*, 96 F. Supp. 704. We contend that the Petitioner's constitutional guarantee of a fair trial was not denied by the court's ruling in spite of the ruling in *In Re Murchison*, because the facts in *In Re Murchison* are in no way similar or comparable to the facts in the case at bar. In the Petitioner's brief on page 9, he proceeds to set forth the following: "as to the question of when the privilege of non disclosure applies and when an exception should be made, no fixed rule is justifiable".

However, in referring to the above quotation from Petitioner's brief, we hasten to point out that they failed to further set forth the fact hat as taken from *Roviaro v. United States*, 353 U.S. 53, it is stated that the problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors.

We might further point out that the facts in the *Roviaro* case are quite distinguishable from the facts in the instant case. In the *Roviaro case* the informer actually made a purchase from the defendant, and in order for the government to establish a portion of the essential elements of the crime charged it was necessary for them, the government, to introduce testimony of conversations between the informer and the defendant, but in this case, it never was, nor would it have been, necessary to introduce this type of testimony, as such testimony didn't even exist. The record discloses that the only reference to an informer was raised by the defendant who, by his persistent cross examination, indicated that he knew the identity of the informer. This fact is even emphasized in the Petitioner's brief at page 7, wherein he quotes from the Bill of Exceptions, his proffer of the testimony of the state's witness, Captain Sawyer of the Columbus Police Department:

> "Mr. Britt: I would like the record to show that if it had not been restricted upon cross examination of Captain Tom Sawyer of the Columbus Police Department, who was head of the Detective Bureau, that we would have been able to establish through his testimony and the records made in the ordinary course of conduct of the Police Department that the burglary in question was committed as induced by an officer of the Columbus Police Department *in conjunction with Jack Wilson who has been previously identified and will be further identified*, and that had he been required to testify, all the elements of entrapment would have been developed in cross examination of Captain Sawyer."

Therefore, the court's ruling which prevented the disclosure of the name of the informant was in no way a denial of the Petitioner's constitutional rights.

It very well should be noted at this point that any testimony which might have been elicited from the police officers

as to any conversation which they might have had with an informer would certainly have done violence to the hearsay rule, because said conversations would have been out of the presence of and the hearing of the Petitioner.

In the Petitioner's second division of his argument, he refers to and bases his contention upon the res gestae rule as an exception to the hearsay rule. The only indication throughout the entire record of the trial that the police department had any knowledge of a burglary was that they received an "anonymous tip". The record is completely silent as to any information as to time, method or manner, of the commission of said offense, as well as completely silent as to any participants in the offense. Also, it is completely silent as to when said anonymous tip was received by the police department. We believe that the Petitioner, in order to come within the res gestae, would have to have some evidence tending to show that said anonymous tip was reasonably close to the time of the commission of the offense.

In setting forth the basis for the application of the res gestae, Petitioner is relying on *Morgan v. The State*, 48 Ohio St. 371, paragraph 2 of the syllabus, which reads as follows:

> "Where one of several defendants jointly indicted for a felony is tried separately, and the prosecuting witness testifies in chief that the offense was committed by several persons acting together, and testifies to the identity of the defendant upon trial, it is proper, in cross examination, for the defense to inqure as to the identity of the other participants, and it is error for the court to refuse to permit such cross examination."

However, this particular case deals with the cross examination of the prosecuting witness as to the identity of co-defendants and in no way deals with the question of res

gestae, and we might add that as to a limitation of cross examination, this case does not apply to the facts; nor the argument as set forth by the Petitioner in the case at bar.

In order to be consistent with the theory of entrapment which the Petitioner attempted to introduce as a defense, we feel that the defendant would have to admit that he was induced to commit a crime by a law enforcement officer or his agent; however, the defendant, or Petitioner, testified that he was invited to go see a girl and indicated that he at no time knew that the other person was going to commit a burglary. See Bill of Exceptions, pages 226 through 229. Therefore, he cannot assert the defense of entrapment because, according to him, he knew nothing about a crime being committed, and in no way participated in the commission of the crime. We would urge that he must rely upon an outright defense of not guilty, or he must rely upon a defense which might be termed guilty, but not guilty by reason of entrapment. Otherwise, he is attempting to talk out of both sides of his mouth.

CONCLUSION

We believe that this case can best be summarized by referring to some excerpts from the key case in point, namely, *Roviaro v. United States.*

First, the *Roviaro case* was decided on federal statutes, not on rulings of state courts.

Second, we would urge the Court to strongly consider the language in *Roviaro v. United States*, 353 U.S. 53, at page 59, as follows:

> "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

And, finally, that portion of the above cited case, the dissenting opinion of Justice Clark, which reads:

> "In fact, a casual reading of the record paints a picture of one vainly engaging in trial tactics rather than searching for real defenses—shadowboxing with the prosecution in a baseless attempt to get a name that he already had but in reality hoping to get a reversible error that was nowhere else in sight. We should not encourage such tactics."

We, therefore, would urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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